

CURRENT DEVELOPMENTS

A new Solange judgment from Germany – or nothing to worry about?

JULIAN NOWAG — 22 March, 2016



In its recent decision ([in German](#), [press release in English](#)) on Mr R the Bundesverfassungsgericht (BVerfG or the Court) rejected an extradition request pursuant to the European Arrest Warrant (EAW). The Court invalidated a decision of the Higher Regional Court of Düsseldorf to extradite Mr R to Italy under the EAW because the decision would violate human dignity as protected by Art 1(1) of the German Constitution.

The background

In 1992, a court in Florence had sentenced Mr R, a US citizen, to 30 years of imprisonment for cocaine smuggling and mafia membership. These proceedings took place *in absentia*. Not only was Mr R not present at the proceedings but he also claimed not to have been aware of them.

In 2014, Mr R was arrested in Germany based on an EAW issued by Italy. The Higher Regional Court of Düsseldorf found that Mr R could be extradited to Italy. Against this decision Mr R lodged a constitutional complaint to the BVerfG.

The legal framework is provided by Art 4(a)(1)(c)(d) of the Framework decision on the European Arrest Warrant (which was an amendment of Council Framework Decision 2009/299/JHA) and Sec 83(3) of the Act on International Mutual Assistance in Criminal Matters which implements the framework decision.

The framework decision allows rejecting extradition requests where the defendant was not present at the trial if there is no 'right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined.' The implementing German law made use of this option. Under German law extradition is only allowed where a new judicial procedure takes place which guarantees the full examination (including new facts) of the accusation and the accused is present.

In the extradition proceedings concerning Mr R there were doubts as to whether new facts could be presented at judicial proceedings in Italy. R had argued that the Italian criminal procedure code would not guarantee that new

evidence could be presented. The Düsseldorf court rejected this argument and decided to extradite Mr R after a response from the Italian prosecutor's office. It found that 'taking into account new evidence was at least not impossible' under the relevant Italian criminal procedure.

The Decision of the BVerfG

The BVerfG held that this decision violated the German Constitution. The Court rather briefly examined the question of admissibility (para 34) and found that the matter was admissible as a violation of human dignity was alleged and such a claim would form part of the constitutional identity review.

In terms of substance, the judgment begins by highlighting the limits the German Constitution places on primacy of EU law namely constitutional identity (para 37-50). The Bundesverfassungsgericht then explains that the constitutional identity would encompass in particular the unamendable, constitutional guarantees/eternity clause (Ewigkeitsklausel, Article 79(3) and 23(1) first sentence of the constitution) including the guarantee of human dignity. Human dignity would include the principle of individual fault (Schuldprinzip).

In the second part of the judgment the Court stresses how the decision of the Düsseldorf court violates human dignity as part of the eternity clause (para 51-124). In this section the Court explains that the principle of individual fault would set minimum requirements which need to be observed in extraction proceedings (para 52-75). Moreover, the BVerfG declares that while the EAW would usually take precedence over German law this would not mean that the national

courts would not be required to comply with the requirements of human dignity (para 76-109). In fact, mutual trust as enshrined in the EAW would be limited by human dignity as protected by the German Constitution (para 83).

After this part the Court (surprisingly) finds that such a limitation of primacy would not be needed. The EAW as well as the implementing law on mutual assistance in translational criminal matters' would sufficiently protect human dignity (para 84).

Yet, it nonetheless finds that the Düsseldorf court violated the human dignity of Mr R as protected by the German Constitution by not sufficiently examining whether Mr R would be able to present new evidence in a trial in Italy. (109-123).

In its final part the judgment very briefly explains that a reference to the Court of Justice (CJ) would not have been necessary due to the *acte claire* doctrine. The case law would be clear and EU law would not prevent the Düsseldorf court from investigating whether Mr R could or could not present new evidence in a trial in Italy (para 125).

Comment

The decision of the constitutional court has already created strong reactions by commentators. Some claim that it would create a Solange III situation. Other have described it as pushing the button on the constitutional identity bomb and a bad decision during a bad time.

In principle, the decision in Mr R seems to follow the constitutional identity logic, developed in the BVerfG' Lisbon judgment. The Court finds that human dignity would form

part of its constitutional identity review. And it was this logic that informed the finding that the extradition order was unconstitutional. However, I would possibly not describe the decision as pushing the constitutional identity bomb button. In particular given that the Court finds that the same protection of human dignity would be afforded by the EAW. Thus, rejecting the extraction could have similarly been based on EU law without resorting to human dignity as protected by the German Constitution.

However, basing this decision on constitutional indemnity and human dignity is troubling for another reason. The question that can be raised is whether the constitutional identity review door has been opened too far. If the principle of individual guilt is found to form part of human dignity and every EU act can be examined against it, what about other fundamental rights? It could easily be argued that a vast number (if not all) of fundamental rights are based on human dignity. With this decision the BVerfG has created a new avenue to challenge EU acts before the Court. The decision may undo the admissibility hurdle of the Banana market decision and the Court may be faced with numerous challenges in the future. Clarification in this regard will be dearly needed.

In terms of the Solange claim, two things can be observed. First, the Court based the review on constitutional identity. Second, the word 'solange' is not present in the judgment. In fact, because the Court based the judgment on the constitutional identity review the case is not really an 'as long as' situation. Given that the constitutional identity review will always be exercised, the case rather reaffirms the review power of the BVerfG. The judgment makes clear that the constitutional identity review will *always* be performed

by the BVerfG: the BVerfG chose a reasoning based on constitutional identity although it held that the EAW would already sufficiently protect human dignity and thus the same result could have been reached under EU law. The BVerfG made clear that even though the EAW would usually take precedence over German law, German courts would still have to comply with human dignity as protected by the German Constitution. Hence, if one would like to formulate a *solange* message from this judgment it would rather be: As long as this German constitution exists, the BVerfG will perform this kind of review.

A couple of further points should be highlighted. First, some of the most interesting parts have been dealt with rather briefly, ie in one paragraph. This is true for the questions of admissibility and *acte claire*.

As already pointed out, the admissibility point might come back to haunt the BVerfG in future decisions as every applicant from now on will try to frame its application in terms of human dignity.

The other question is *acte claire*. According to *acte claire* (established by the CJ in Da Costa and CILFIT) there is no requirement to ask for a preliminary reference if the question of EU law is already clear. Whether the case of Mr R was really an act clear can be doubted. First, Melloni to which the BVerfG refers seems to relate mainly to the clash between constitutional law and the EAW. The question in this proceeding was the level of security under the EAW with regard to criminal procedures in another EU country. Melloni seems not to address this issue. While it may be possible to see this issue as one of national procedural autonomy (possibly supported by the human dignity

argument), the current European case law or legislation is not clear on this matter. Thus, a preliminary reference may very well have been due. Yet, one may come to a different conclusion when taking into account the recent reshaping of the *acte claire* doctrine. Yet, asking the question in particular when taking into account the human dignity and constitutional identity aspect (while possibly not required) would have been a sign of dialog with the CJ.

Moreover, such a reference would prevent any problems that may arise if the Düsseldorf court decided to put such a question to CJ as a preliminary reference as some have suggested (see comments here).

Conclusion: While not Solange III, other issues are raised

The outcome of the case may seem clear even without an in-depth investigation of EU and German constitutional law: it was not enough for the Düsseldorf court to simply leave Mr R with the statement that ‘taking into account new evidence was at least not impossible.’ In the case of doubts about Italian criminal procedure a more thorough investigation was needed.

From a human rights perspective the case seems to be a clear win. Any defendant in Germany now has the chance to plead EU fundamental rights as well as human dignity as part of Germany’s constitutional identity where EU law is applied. In this way the court added another layer of protection. Moreover, the BVerfG seems to have brought up a painful subject once more: Italian criminal proceedings *in absentia*.

Yet, the case seems to be a bad case – a bad case in the sense that the outcome was clear but the reasoning might

create further problems down the line. The case establishes two standards of human dignity protection, the EU standard and the German standard. What will happen if the two standards conflict? (Well at least the answer of the BVerfG seems clear) What happens if the Düsseldorf court would now decide to make a reference to the CJ? Will every applicant to the BVerfG now argue that there has been a breach of human dignity? Where does human dignity stop and general fundamental rights protection begin if fundamental rights are derived from human dignity?

A final thought: If the BVerfG would approve the Outright Monetary Transactions (OMT) programme, the decision concerning Mr R may be used to retrospectively reaffirm the review powers of the BVerfG (for the relevant CJ decision in Gauweiler and a comment see here). In anticipation of approving the OMT programme the Court had to make a point and show that its review powers are alive and well.

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4 Comments



ILIYA TSIKALOV

31 March, 2016 at 14:27 — Reply

Great analysis. It is not the first time though the BVerfG impliedly shows a stronger preference for the German Consitution when rights stemming from it need to be balanced against EU law. Reference for a premilitary ruling to the CJ would have been interesting as well. The BVerfG affirms once more its willingness for a review and ability for, one may say, quite a controversial reasoning.



JULIAN NOWAG

18 November, 2016 at 20:18 — Reply

Dear Iliya,

first of all sorry for the late reply, I did not get any notification of your comment and only now by accident saw it.

Thanks for your comment. This is indeed very true and important, but the word limits of a blog posts sometimes means that you need to limit what you can examine. I have done a more substantive piece, which can be found here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840473 and a version of the paper has now also been published in the latest CMLRev...



ILIYA TSIKALOV

23 November, 2016 at 13:03 — Reply

Dear Julian,

I understand that in these comments one should limit his elaborations, even though sometimes it is quite difficult bearing in mind such interesting cases.

Just read the more substantive piece and it is a great analysis.

Certainly a clash between CJ and BVerfG.



JULIAN NOWAG

23 November, 2016 at 22:23 — Reply

Thank you Iliya! 😊

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